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No. 03-627

IN THE

Supreme Court of the United States

ROBERT D. BLANDFORD, ABNER SCHOENWETTER, AND DIANE H. HUANG,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners Robert D. Blandford, Abner Schoenwetter, and Diane H. Huang hereby reply to the Brief for the United States in Opposition.

1. In its Opposition, the United States does not dispute petitioners' argument (Pet. 21) that whether "foreign law" in the Lacey Act encompasses regulations is an important question of federal law. Opp. 14-16.[1] The United States summarily states that the lower court "correctly rejected" petitioners' arguments that the phrase

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[1] Neither does the United States dispute petitioners' assertion that they and others similarly situated "have been, or are being, unfairly targeted for minor foreign regulatory infractions under the Lacey Act" and that this issue is likely to recur. Pet. 23. Here, petitioners Blandford and Schoenwetter and co-petitioner David Henson McNab (03-622 Pet.) each received draconian 97-month prison sentences for "smuggling" lobster tails from Honduras in clear plastic bags that were routinely inspected by U.S. Customs and FDA officials rather than in opaque cardboard boxes. As the Brief of Amici National Association of Criminal Defense Lawyers (NACDL), *et al.*, alarmingly notes (NACDL Br. at 9-10), even a misdemeanor (with a "should have known" standard of intent) Lacey Act violation of obscure foreign wildlife or fishing regulations can be unfairly bootstrapped, as it was here, into felony smuggling and money laundering charges resulting in substantial prison sentences. While the average prison sentence in the Eleventh Circuit for Environmental and Wildlife offenses is 9.6 months, *id.* at 10, the sentences imposed here for first offenders were up to 10 *times* that level, and greater than prison sentences imposed on many drug dealers and offenders guilty of serious *malum in se* crimes rather than regulatory Lacey Act infractions, where administrative and civil remedies are available and more appropriate. Pet. 6, n.4. Furthermore, according to the most recent report available, of all the various federal environmental statutes on the books, the Lacey Act is the one statute that is regularly invoked the most often for criminal investigation. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Enforcement of Environmental Laws, 1997* at 3 (Table 3) (Nov. 1999).

"foreign law" excludes regulations. Opp. 14. In doing so, the United States does not address any of petitioners' arguments that the decision ignored or violated basic canons of statutory construction that this Court has established. Pet. 23-29. The United States does not even *attempt* to defend the reasoning of the court of appeals or the pair of Ninth Circuit decisions upon which the lower court relied. Instead, the United States is content simply to claim there is no direct conflict among the circuits or this Court on the specific issue presented and that the outcome is consistent with the outcome of three non-Lacey Act cases.

a. The United States (Opp. 15) cites two Ninth Circuit cases interpreting the Lacey Act upon which the panel below relied, *United States v. Lee*, 937 F.2d 1388 (1991), and *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824 (1989), without addressing any of petitioners' arguments (Pet. 21-28) as to why those decisions interpreting the phrase "any foreign law" to include regulations were erroneous.[2] As argued in more detail in the Petition, if foreign law includes regulations, then the word "regulation" in the Lacey Act used in conjunction with the phrase "State law" is redundant. A construction that makes a word redundant is to be avoided wherever possible. And even if the legislative history were relevant, before 1981, the Lacey Act regulated trading in wildlife "in violation of any law or regulation of any State or foreign country" (formerly 18 U.S.C. § 43(a)(2)). In 1981, however, Congress repealed the Lacey Act *in its entirety*, failed to adopt a proposal to include a definition of "foreign law" to mean "laws or regulations of a foreign country,"

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[2] The United States also cites a few other lower court Lacey Act cases but concedes the issue was not even expressly presented in those cases. Opp. 15, n.7.

and instead enacted the current law which omits the term "regulation" with respect to foreign law, but kept the term when describing the coverage of the Act for violation of "any law . . . or *regulation of the United States*," 16 U.S.C. § 3372(a)(1) (emphasis added) and "violation of any law *or regulation of any State*. . . ." 16 U.S.C. § 3372(a)(2) (emphasis added). Applying basic rules of statutory interpretation, foreign "regulations" are not covered by the Lacey Act.

b. The United States also cites three non-Lacey Act cases, *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979), *United States v. Mitchell*, 39 F.3d 465, 468 (4th Cir. 1994), and *United States v. Howard*, 352 U.S. 212, 216 (1957). Opp. 14-16 & n.8. But in those three cases, contrary to the Lacey Act, the statutes at issue did *not* use the words "law" and "regulation" in a manner that would render the term "regulation" superfluous if it were included in the definition of "law." *See Chrysler*, 441 U.S. at 294 (unlawful to disclose information "not authorized by law"); *Mitchell*, 39 F.3d at 467-68 (unlawful to import merchandise "contrary to law"); *Howard*, 352 U.S. at 213 (unlawful to transport fish across state lines "contrary to the law of the state * * * from which such * * * fish * * * is to be transported"). Thus, none of these three cases addressed the question presented here, and none exempts the Lacey Act from the traditional rules of statutory construction.

Chrysler is distinguishable for an additional reason: the issue there was whether the statute should be read broadly to *preclude* criminal liability, not to *impose* it as here. The statute made it a crime to disclose information that was "not authorized by law." The Court held that disclosure pursuant to a federal regulation was authorized

by law, and hence there was no criminal liability. Here, in contrast, the United States seeks a broad reading of "law" to include "regulations" to *establish* criminal liability. It is in this relevant context that this Court, as well as lower federal courts, have been reluctant to read "law" to include "regulations." *See, e.g., United States v. Eaton*, 144 U.S. 677, 688 (1892); *United States v. Gordon*, 464 F.2d 357, 357-58 (9th Cir. 1972) (per curiam). The United States distinguishes *Eaton* on its facts and asserts that the case did not state a fixed principle that a regulation can never be a law (Opp. at 16), but does not explain what about *Eaton*'s facts is distinguishable, what principle *Eaton* does allegedly stand for, and why that alleged principle does not apply here. Further, the United States does not even address *Gordon*, neither does it deny that there is a conflict on this issue between *Gordon* and the divided panel in *Mitchell*.

Further, petitioners acknowledged (Pet. 29 n.9) that this Court in *Howard* held that the then-current version of the Black Bass Act (a predecessor to the Lacey Act) encompassed certain Florida regulations. Petitioners explained, however, that *Howard* is distinguishable because a Florida statute had expressly made it a criminal offense to violate the regulations at issue. *See Howard*, 352 U.S. at 213 ("The relevant fishing provisions consisted of the rules and regulations of the Florida Game and Fresh Water Fish Commission *and a criminal penalty imposed by the legislature for violation of the rules*") (emphasis added). Numerous cases support this ground for distinguishing *Howard*. *See Gordon*, 464 F.2d at 357-58 (distinguishing *Howard* on the ground that "a violation of the applicable regulation of the Florida Game Commission was punishable as a crime," whereas "a violation of the applicable Nevada Gaming Commission regulation can lead only to civil sanctions"); *see also United States v. Goldfarb*, 643 F.2d

422, 428-29 (6th Cir. 1981) (court notes, and government concedes, that a violation of Nevada Gaming Commission Regulations could not in and of itself form the predicate state law violation required for a federal prosecution under the Travel Act); *United States v. DeLuna*, 763 F.2d 897, 906-07 (8th Cir. 1985) (following *Goldfarb* on this point). Inexplicably, the United States is content (Opp. at 16 n.8) simply to restate the holding in *Howard*, without addressing petitioners' argument that it is distinguishable under this established precedent.

c. Finally, the United States did not address petitioners' argument (Pet. 29-30) that the Lacey Act is at least ambiguous on this issue so that the Rule of Lenity applies in this criminal case. The United States does not refute petitioners' claim that this Court should grant *certiorari* to determine whether the Rule of Lenity, "rooted in fundamental principles of due process," applies here, either with respect to this question, or with respect to the meaning of Honduran law. *See Dunn v. United States*, 442 U.S. 100, 112 (1979).

2. The United States concedes that "federal courts have developed the practice of granting *substantial . . . deference* to a foreign nation's representations respecting its own laws." Opp. 17-18 (emphasis added). Yet the panel majority, in sharp conflict with its sister circuits, did not apply *any* deference, let alone *substantial deference*, to the authoritative and official views of the Republic of Honduras respecting the interpretation and validity of its own laws. To the contrary, the panel majority expressed hostility to those authoritative views, opting instead to rely upon (subsequently recanted) testimony at the foreign law hearing of a single midlevel agency official who had no authority to interpret Honduran law, let alone provide a United States

court with the official views of the Honduran government respecting those laws.[3]

Review is thus warranted to resolve this clear conflict among the Eleventh Circuit and the other circuits over the appropriate degree of deference afforded foreign countries' authoritative views of their own laws, particularly where litigation in federal courts over the meaning of foreign laws in resolving disputes continues to grow in frequency and importance.

a. The United States argues (Opp. 20) that this Court should not grant *certiorari* because the panel majority simply applied an undisputed standard of deference to

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[3] The United States incorrectly suggests that at the pretrial foreign law hearing, "Honduran officials testified that the resolution [030-95] was valid at the time of the offense." Opp. 11. There was only *one* official who testified live, Lillian Paz, Secretary General of the Ministry of Agriculture and Livestock, who, according to the Honduran government, had "*no* authority" to testify on the country's behalf. Br. for Honduras at 15. Paz's duties as Secretary General did *not* include interpreting or enforcing Honduran laws. Her main job duties were essentially to keep official records of the agency and to perform related ministerial tasks. When asked what her duties were, Paz testified, "What I do is attest to the authenticity of the signatures of the Ministers" and certify that copies of agency documents conform to the originals. 03-622 Pet. App. 160a. Thus, her duties were more akin to those performed by a notary rather than those of a General Counsel or Legal Advisor of an agency possessing expertise in the laws and regulations that the agency administers. As a young attorney, she did not even occupy the post of Secretary General until May 1999, after this case began. At the pretrial hearing, the United States submitted a certification signed on February 24, 1999 by Paz's predecessor, Ildefonso Paredes, a nonlawyer, who merely verified that the copies of the Honduran regulations involved in this case conformed to the originals. *See* Gov't Exhibit 1.

unique facts. But petitioners argue that the appropriate degree of deference should at least be substantial deference akin to *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984), while the United States explicitly disputes this and argues (Opp. 18 & n.10) that the proper deference is the vague, lower "totality of circumstances" level akin to *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). This is an important issue worthy of *certiorari*. *See United States v. Mead Corp.*, 533 U.S. 218, 221, 226-27 (2001) (Court grants *certiorari* to address whether U.S. Customs Service tariff classification ruling is entitled to *Chevron* or *Skidmore* deference); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 383 (1999) (Court grants *certiorari* to address whether U.S. Customs Service regulations relating to customs classification of certain imported goods issued pursuant to notice-and-comment rulemaking are subject to the analysis required by *Chevron*).

The panel majority did not afford *any* deference to Honduras' authoritative interpretation of the validity or application of its own laws. First, the majority found that Honduras allegedly made a "postconviction shift" of its position.[4] Citing illegitimate "finality" concerns and rank speculation about foreign governments being improperly pressured to change their laws, the majority held that it was not "bound by the Honduran government's current position." Pet. App. 20a.

In contrast to the panel majority's disregard of Honduras' official position, the majority of the circuits

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[4] As petitioners argued, and as the Honduran government and the dissent made clear, there never was a "shift" in the official position of the Honduran government; it has been consistent throughout this case. Br. for Honduras at 15.

appear to afford at least *Chevron* deference, *e.g.*, *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (per curiam), or even categorical deference. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir. 1992). The United States' argument that the appropriate degree of deference is akin to *Skidmore* deference lacks merit;[5] but even if correct, that merely underscores the need for this Court to provide guidance to the lower courts over this recurring and important issue.

This case squarely presents the issue and demonstrates its importance. If *Chevron* deference is appropriate, then federal courts must defer to a foreign country's official interpretation of its laws as long as the

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[5] In *Access Telecom v. MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir. 1999), for example, the court refused to afford deference not because the court found the interpretation inconsistent over time or generally unpersuasive, but because it found that the agency asserting the interpretation was not authorized to do so. Here, in contrast, the panel majority accurately identified "the Honduran government's current position" on the meaning of Honduran law, but simply asserted that the majority was not "bound" to that undisputed authoritative view. Further, the United States erroneously asserts (Opp. 23-24) that *dicta* in *Jota v. Texaco*, 157 F.3d 153, 160-61 (2d Cir. 1998), supports the panel below, because there "the Second Circuit declined to defer to the Republic of Ecuador's changed view of its own law while a matter was on appeal." This is a gross misstatement of the case. Ecuador initially objected to a lawsuit in the United States on international comity grounds, then later changed its mind and expressed consent under limited circumstances. Thus, the case had nothing to do with Ecuador's "view of its own law." Further, the United States concedes (Opp. 24 n.14) that the court left open the question of how to treat Ecuador's changed position as to the desirability of the lawsuit, because it remanded the case for the lower court to properly apply the international comity analysis. Remanding a case so the lower court may apply the correct law is not "declin[ing] to defer" to Ecuador.

interpretation is "reasonable." *Chevron*, 437 U.S. at 844. Here, Honduras' view that the laws and regulations at issue were invalid at the time of the conduct specified in the indictment is reasonable, as amply demonstrated by Honduras' amicus brief. Indeed, the United States does not claim that the panel majority's decision would survive *Chevron* deference.

For example, with respect to the validity of Resolution 030-95 regarding lobster sizes, the pretrial view of the incumbent Attorney General was confirmed by the post-trial ruling of the Honduran Administrative Court that the defectively issued Resolution was "entirely voided," a nullity, and thus void *ab initio*. *See* Br. for Honduras at 8 and App. 18a-19a. With respect to that part of the Honduran court's ruling stating that it was void for "future inapplicability," the Honduran government gave a reasonable explanation that the statement must be read in the limited context of precluding any future "right to claims" or liability against the Honduran government for damages for past enforcement of the invalid resolution. Br. for Honduras 8 and App. 19a.

By comparison, federal courts are often faced with similar questions of government liability where a challenged law or practice is struck down as unconstitutional, and whether qualified immunity for damages may cover only past acts taken under the infirm law. *See, e.g.*, *Connecticut v. Crotty*, 346 F.3d 84, 93 (2d Cir. 2003). Further, if a federal court strikes down a regulation in an administrative challenge because it was procedurally defective, that is grounds for reversal of a criminal conviction that had been based on a violation of the defective regulation. *United States v. Goodner Bros. Aircraft*, 966 F.2d 380 (8th Cir.

1992).[6]

If, however, this Court were ultimately to adopt the United States' position that only a *Skidmore* level of deference is appropriate, a remand to the lower court to make "the *Skidmore* assessment" would nevertheless be in order. *Mead*, 533 U.S. at 238-39.

CONCLUSION

For the foregoing reasons, as well as those provided by petitioner McNab, the Republic of Honduras (03-622 Pet.), and amici NACDL, *et al.*, the petition for writ of certiorari should be granted.

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[6] Similarly, Regulation 0008-93, which requires, *inter alia*, that seafood be packed in cardboard boxes, was validly issued by the President to enforce Honduras' Law of Industrialization of Meat in 1993. But the Congress repealed the law in January 1995, *before* any of the relevant conduct occurred in this case. Under Honduran law, the repeal of a statute automatically repeals the underlying regulations. Therefore, Regulation 0008-93 "had no legal validity or force during the relevant period of time in this case." Br. for Honduras at 9. This interpretation about the effect of a repeal of Honduran law on regulations is similar to that in the United States. *See, e.g.*, *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1575 (Fed. Cir. 1996) ("When a statute has been repealed, the regulations based on that statute automatically lose their vitality.").

Respectfully submitted,

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